

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHRISTINE BRADY**  
Claimant

VS.

**STATE OF KANSAS**  
Respondent

AND

**STATE SELF INSURANCE FUND**

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Docket No. 1,050,052

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the Order on Failure to Pay Compensation to Award Under K.S.A. 44-512b entered by Administrative Law Judge Rebecca A. Sanders on May 25, 2011. This claim was placed on the Board's summary calendar for determination without oral argument. The Director appointed Joseph Seiwert to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. Judy A. Pope, of Leawood, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and the State Self Insurance Fund.

The Administrative Law Judge (ALJ) assessed interest in the amount of \$42.14 for temporary total disability benefits that were due and owing from December 30, 2010, to April 7, 2011.

**ISSUES**

Claimant requests review of the ALJ's finding that interest was due on unpaid temporary total disability benefits for only the period of December 30, 2010, to April 7, 2011. Claimant argues that the mandatory interest assessment authorized by K.S.A. 44-512b should have been assessed for all periods from 2007 and 2008, when the entitlement to temporary total disability benefits arose, until the benefits were actually paid. Claimant also asks the Board to modify the ALJ's order and find that claimant is entitled to interest

on late and unpaid temporary total disability benefits through June 30, 2011, in the amount of \$606.07 and continuing to accrue until the unpaid temporary total disability benefits in the amount of \$206.99 are paid.

Respondent argues that it was not until December 7, 2010, that respondent had sufficient information to determine that claimant's request for temporary total disability benefits was valid and the ALJ's order for \$42.14 in interest is the correct amount for respondent to pay in this matter.

The issue for the Board's review is: Should interest under K.S.A. 44-512b be awarded on the unpaid temporary total disability benefits and if so, when should interest start to accrue?

#### **FINDINGS OF FACT**

Claimant suffered an injury to her left shoulder on April 10, 2007. On March 25, 2010, claimant's attorney sent respondent a demand letter asking for "temporary total disability benefits related to her time off work to recuperate from the first and second surgeries on her left shoulder . . . ."<sup>1</sup> No dates for the periods of temporary total disability were set out in this demand letter.

Claimant filed her Application for Hearing on March 26, 2010, claiming injuries to her "left shoulder and all parts injured or affected . . . ."<sup>2</sup> A Prehearing Settlement Conference was held on August 24, 2010, at which time claimant's attorney indicated there was an issue concerning temporary total disability benefits, but there is no indication that claimant requested interest at that time.<sup>3</sup>

At the regular hearing held November 8, 2010, the attorney for respondent admitted that claimant met with personal injury by accident on April 10, 2007, and that the claim was compensable. The parties stipulated that temporary total disability benefits were paid in the amount of \$1,203.05 for a 2.71 week period from October 14, 2009, to November 1, 2009, following a surgery to claimant's left shoulder. Claimant's attorney also announced that there was still a claim for unpaid temporary total disability benefits for the weeks following claimant's two prior surgeries. The only issues for the ALJ to decide in the Award were nature and extent of claimant's disability, whether claimant was entitled to unauthorized medical and future medical compensation, and whether temporary total disability benefits were due for the period of time claimant was off work following her

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<sup>1</sup> Motion for Penalties and Interest Hearing Trans. (May 10, 2011), Cl. Ex. 1 at 1.

<sup>2</sup> Application for Hearing filed March 26, 2010.

<sup>3</sup> See Motion for Penalties and Interest Hearing Trans. (May 10, 2011) at 6.

surgeries in 2007 and 2008. There was no mention at the regular hearing of an interest penalty being sought because of respondent's delay in paying those temporary total disability benefits.

At the regular hearing, claimant was asked about the dates of her three surgeries and how long she was off work. Claimant was able to say only that her first surgery was in 2007 and the second surgery was in 2008. She thought she was off work 31 to 33 days after her first surgery and about 23 days after the second surgery. She testified she was not paid any temporary total disability benefits for either period. It was decided by the parties to pin down the dates of claimant's first two surgeries when the deposition of Dr. Kenneth Wertzberger was taken.

The deposition of Diane Waggoner, who handles workers compensation matters for claimant's employer, Kansas Neurological Institute, was taken on November 10, 2010. She testified she was aware that claimant suffered a work-related accident on April 7, 2007.<sup>4</sup> She testified that claimant was off work for the dates of September 26, 2007, to October 28, 2007, for surgery to her left shoulder. Ms. Waggoner testified that claimant brought her the paperwork showing she was having surgery and that she would be off work post-surgery. Ms. Waggoner also was given a note by claimant indicating she would have another surgery for her left shoulder, that one on August 13, 2008. The note indicated claimant would tentatively return to work on August 22, 2008. Ms. Waggoner testified that claimant was off work for that surgery from August 13, 2008, through September 1, 2008. Respondent, however, did not pay claimant temporary total disability benefits for either the period of September 26, 2007, to October 28, 2007, or from August 13, 2008, to September 1, 2008.

On November 17, 2010, claimant's attorney sent respondent's attorney a proposed Stipulation to the dates claimant was off work and for which she was not paid temporary total disability benefits. Respondent's attorney would not sign the proposed stipulation, stating he did not know when the surgeries were performed or what dates Dr. Wertzberger had taken claimant off work.<sup>5</sup>

Dr. Wertzberger's deposition was taken on December 30, 2010. He testified he performed surgeries on claimant's left shoulder in September 2007 and again in August 2008. At the end of the deposition, respondent's attorney stated: "... I asked the adjuster

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<sup>4</sup> Although Ms. Waggoner testified the accident occurred on April 7, 2007, the parties stipulated at the regular hearing that the date of accident was April 10, 2007.

<sup>5</sup> Respondent's brief states that its attorney sent an email to claimant's attorney on December 6, 2010, asking if claimant really wanted temporary total disability benefits for the weeks in question, as she might have to pay back respondent for vacation time paid to her for those periods, and that on December 7, 2010, claimant's attorney emailed him back telling him claimant wanted the temporary total disability benefits. These email communications were not made a part of the record.

to go ahead and cut a check for temporary total for the periods of 9-26-07 through 10-28-07 and again from 8-13-08 through 9-1-08. I checked before I came over here and those haven't been paid yet."<sup>6</sup>

Claimant filed her submission brief to the ALJ on January 11, 2011. Her submission brief did not request interest for respondent's failure to pay the admitted temporary total disability compensation when it was due.

On February 4, 2011, the ALJ entered an Award in this claim. In the Award, the ALJ found: "Claimant is entitled to temporary total benefits from the period of September 26, 2007 through October 28, 2007 and August 13, 2008 through September 1, 2008,"<sup>7</sup> a period of 7.57 weeks at \$437.26 per week for a total of \$3,310.06. On February 4, 2011, claimant's attorney sent a demand letter to respondent asking for temporary total disability compensation and permanent partial disability compensation as was ordered in the Award. Claimant's attorney sent respondent another demand letter on March 3, 2011, seeking payment of 10.28 weeks of temporary total disability compensation at the rate of \$437.26 in the amount of \$4,495.03.

On March 7, 2011,<sup>8</sup> respondent issued three checks payable to claimant and her attorney: (1) A check in the amount of \$696.97 in payment of temporary total disability benefits from September 26, 2007, to October 6, 2007, at the rate of \$443.93<sup>9</sup> per week; (2) a check in the amount of \$696.97 in payment of temporary total disability benefits from August 13, 2008, to August 23, 2008, at the rate of \$443.93 per week; and (3) a check in the amount of \$506.08 in payment of temporary total disability benefits from August 24, 2008, to September 1, 2008, at the rate of \$443.93 per week. This left a balance due of \$1,410.04.

The ALJ's Award was appealed by respondent on February 4, 2011, on the issue of nature and extent of claimant's disability. Claimant raised the issue of the admissibility of the medical report of Dr. William Hopkins. Neither compensability of the claim nor the issue of temporary total disability benefits were made issues in the appeal. On May 6, 2011, the Board issued its Order affirming the ALJ's Award.

On February 25, 2011, claimant filed a Motion and Application for Hearing on Claimant's Request for Interest Due Pursuant to K.S.A. 44-512b and for Penalties Due

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<sup>6</sup> Wertzberger Depo. at 24-25.

<sup>7</sup> ALJ Award (Feb. 4, 2011) at 7.

<sup>8</sup> The checks were received by claimant's attorney on March 11, 2011.

<sup>9</sup> The Award reveals that the parties stipulated to an average weekly wage of \$655.86, and the correct compensation rate is \$437.26.

Pursuant to K.S.A. 44-512a. On March 31, 2011, claimant filed an Amended Application for Interest Pursuant to K.S.A. 44-512b and for Penalties Pursuant to K.S.A. 44-512a.

On April 4, 2011<sup>10</sup>, respondent issued two checks payable to claimant and her attorney: (1) A check in the amount of \$887.86 for temporary total disability benefits from October 7, 2007, to October 20, 2007, at the rate of \$443.93 per week; and (2) a check in the amount of \$315.19 for temporary total disability benefits from October 21, 2007, to October 28, 2007, at the rate of \$443.93. per week.

As of April 7, 2011, there remained \$206.99 in temporary total disability benefits unpaid by respondent. On May 18, 2011, the ALJ issued an Order on Application for Penalties finding that temporary total disability benefits became due and owing on February 27, 2011. The ALJ assessed a penalty pursuant to K.S.A. 44-512a against respondent in the amount of \$100 per week until the temporary total disability benefits were paid. As of May 10, 2011, there was \$1,200 in penalties assessed against respondent. There was no appeal taken from this order by either party.

On May 19, 2011, claimant filed a Motion for Clarification and/or Order Nunc Pro Tunc asking that the May 11, 2011, order be revised to include a ruling on claimant's request for interest pursuant to K.S.A. 44-512b. The ALJ issued her order on May 25, 2011, assessing interest in the amount of \$42.14 for temporary total disability benefits in the amount of \$3,310.05<sup>11</sup> that were due and owing from December 30, 2010, to April 7, 2011. This is the order that claimant has appealed to the Board.

### **PRINCIPLES OF LAW**

K.S.A. 44-512a(a) and (b) states:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for

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<sup>10</sup> The checks were received by claimant's attorney on April 7, 2011.

<sup>11</sup> Although this is the figure used by the ALJ in her Order, by the Board's calculation the correct figure would be \$3,310.06.

such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

K.S.A. 44-512b(a) states:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

### ANALYSIS

First, it should be noted that the Board has determined that the ALJ's May 18, 2011, Order On Application for Penalties is not before the Board in this appeal. Neither party appealed that order, and even though the May 18, 2011, order followed from the same motion and hearing as the May 25, 2011, order, they were separate and distinct orders. The May 25, 2011, order was not an order nunc pro tunc. While it may have corrected an oversight, it did not correct a clerical error in the May 18, 2011, order. The May 18, 2011, order only addressed penalties under K.S.A. 44-512a, whereas the May 25, 2011, order only addressed interest under K.S.A. 44-512b. Only the May 25, 2011, order was appealed. Therefore, the Board will only address claimant's request for additional interest pursuant to K.S.A. 44-512b.<sup>12</sup>

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<sup>12</sup> It is further noted that in their briefs to the Board, neither party took issue with the penalties awarded by the ALJ in the May 18, 2011, order. The only issue discussed in both briefs was the issue of interest pursuant to K.S.A. 44-512b.

Before reaching the merits of claimant's argument for additional interest, the Board must first address the timing of claimant's request. The first mention of interest on the unpaid temporary total disability compensation was claimant's post-award Motion and Application for Hearing on Claimant's Request for Interest Due Pursuant to K.S.A. 44-512b and for Penalties Due Pursuant to K.S.A. 44-512a filed on February 25, 2011. K.S.A. 44-512b requires interest on disability compensation found to be due and unpaid where there was no just cause or excuse for the failure of the employer or its insurance carrier to pay such compensation prior to an award "upon a hearing conducted pursuant to K.S.A. 44-523." As such, the ALJ's authority to award interest follows from the K.S.A. 44-523 hearing, that is, the regular hearing. Claimant did not raise the issue of interest at the regular hearing, and the ALJ did not order interest in the February 4, 2011, Award. The failure to award interest was not raised as an issue in the appeal of the ALJ's Award to the Board. Claimant is not entitled to seek pre-award interest in a post-award proceeding. K.S.A. 44-512b is concerned with interest on unpaid compensation "prior to an award." It does not provide for interest on compensation that remains unpaid post-award. The remedy for that is in the penalties statute, K.S.A. 44-512a.

#### **CONCLUSION**

The ALJ erred in awarding interest on pre-award temporary total disability compensation in a post-award proceeding.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order on Failure to Pay Compensation to Award Under K.S.A. 44-512b entered by Administrative Law Judge Rebecca A. Sanders dated May 25, 2011, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and the State Self Insurance Fund  
Rebecca A. Sanders, Administrative Law Judge